No. 11399.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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SEARS, ROEBUCK & Co., a corporation,

*Appellant,*

*vs.*

FRED HARTLEY,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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### Introduction.

The contention in Appellee's Brief (pp. 7 and 8) that there was evidence from which the jury could find that respondent was "reasonably certain" to suffer pain in the future goes to the vital issue in this appeal. We will show hereafter that such contention cannot be sustained. The various authorities cited by Appellee are cases which are not analogous to the facts in this appeal and, as will be pointed out hereafter, the principles they announce do not conflict with the controlling authorities cited in our opening brief.

## I.

## There Was No Evidence That Appellee Was Reasonably Certain to Suffer Future Pain.

Appellee's alleged evidence of future pain is as follows (Appellee's Br. pp. 7 and 8):

The physician had difficulty removing the plaster of paris without an anesthetic and appellee suffered "exquisite pain" at that time—(6½ months prior to trial); that on October 19, 1945 (6½ months prior to trial) Appellee felt sick and dizzy; that his wife (at a time 6½ months before trial) observed his discomfort and headaches; that his subjective feeling like a fly bothering him lasted until 5 or 6 weeks before trial; that his wife noticed a "big difference" in Appellee's hearing after the accident; and, finally, that Appellee cried on the stand while telling his story to the jury.

Such is the evidence which Appellee claims meets the requirements of the California law of establishing "with reasonable certainty" that Appellee will suffer future pain.

Such evidence utterly fails to meet the standard of reasonable certainty established in the *Silvester* and *Bellman* cases, cited in Appellant's opening brief:

> "To entitle a plaintiff to recover present damages for apprehended future consequences, *there must be evidence to show such a degree of probability as amounts to a reasonable certainty* that they will result from the original injury." (Italics ours.)
>
> *Silvester v. Scanlan*, 136 Cal. App. 107, 111, 28 P. (2d) 97, 99.

> "By this section (C. C. 3283) in an action for personal injuries recovery is limited so far as physical suffering, or pain, or mental anguish is concerned, to compensation for the consequences which have occurred up to the time of trial, or it is *reasonably certain* under the evidence will follow in the future (citing). *The jury may not consider consequences which are only likely to occur.*" (Italics ours.)
>
> *Bellman v. San Francisco H. S. Dist.*, 11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.

Appellee in his brief attempts to make much of the fact that Appellee wept on the stand when describing his pain some 6½ months previously. In a brief of some 13 pages, Appellee describes that incident on pages 3, 8, and 11. The motives which caused Appellee to weep on the stand are necessarily buried in his own breast. It seems fair comment, however, to point out that Appellee admitted that when Appellee gave his deposition at an earlier date, he testified about his earlier pain without crying (p. 104). The record consequently shows that, by itself, the recollection of the doctor's treatment was insufficient to make Appellee cry. The additional element of the presence of a jury was also required. Recollection of past pain cannot support an award for future pain under Section 3283 of the California Civil Code nor, in the light of the record of this case can tears on the witness stand support a claim of an existing or future nervous disorder. The fact that counsel for Appellee in his search for future pain has to grasp at such a straw as this shows the utter lack of substantial evidence to support the submission to the jury of the question of future pain.

Appellee also asserts that this accident accelerated the impairment of Appellee's hearing, apparently basing such

claim on the testimony of Appellee's wife that she noticed a "big difference" in Appellee's hearing after the accident (Brief p. 8). Such subjective testimony does not sustain Appellee's contention that the accident accelerated Appellee's deafness. Appellee's doctor testified that there was no damage to the eardrum except inflammation which cleared in a few days (pp. 96-97). Both physicians testified that Appellee's deafness was caused by catarrh (a nasal condition (pp. 99-100, 174). Both doctors testified that the condition of the hearing nerve was excellent and that the condition was the same for both ears. Both doctors testified that Appellee's hearing was approximately equal in both ears, that his condition was conduction deafness attributable to catarrh, that this is a progressive condition with increasing loss of hearing (pp. 98-100, 172-174). Appellee testified that his hearing became worse over a period of years (pp. 59-64). There was no evidence that this condition was in any way affected, or could be affected, by the temporary presence of plaster of paris on the outside of the eardrum. Had there been a possibility that the accident could have accelerated the impairment of Appellee's hearing it is obvious that Appellee's attending physician, a specialist, would have testified concerning it.

In view of such facts the testimony of Mrs. Hartley that she noticed a "big difference" in Appellee's hearing after the accident is no evidence that the accident caused any impairment of Appellee's hearing. The fallacy of the argument of *"post hoc ergo quod hoc"* has been demonstrated many times. The evidence is uncontradicted that the cause of Appellee's deafness was catarrhal and that it was progressive in character. This fully accounts for the general condition which Mrs. Hartley observed.

The foregoing review of the contentions advanced by Appellee shows that there was no evidence that Appellee was "reasonably certain" to suffer future pain. As pointed out in the *Bellman* case, surmise and conjecture are insufficient to support an award for future pain. "The jury may not consider consequences which are only likely to occur." (11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.)

## II.

## The Authorities Cited by Appellee Do Not Justify Affirmance or Conflict With the Controlling Authorities Cited in Appellant's Opening Brief.

A brief analysis of the cases cited by Appellee will show their inapplicability to this appeal.

The case of *Dougherty v. Ellingson,* 97 Cal. App. 87, 275 Pac. 456, cited on page 5 of Appellee's brief, was an action for negligence. Unlike the case at bar, there was no contention in that case that there was no evidence to support an award for future pain and suffering. The contention there made was that the phrasing of the instruction permitted the jury to "consider future pain and suffering irrespective of whether such pain produced damage." (275 Pac. 460.) The Court said it was "highly improbable" that the instruction misled the jury but the jury in any event could not have been misled in view of the following instruction to "award only such damages as she has proved she sustained together with what she is reasonably certain to suffer in the future" (p. 460). Since in the *Dougherty* case there was no claim of an absence of evidence of future pain it is obvious that it is inapplicable here.

*L. A. County Flood Control Dist. v. Abbot,* 24 Cal. App. (2d) 728, 76 P. (2d) 188, cited on page 5 of Appellee's brief, involved an eminent domain proceeding. It states the familiar rule that instructions are to be considered as a whole.

*Long v. Barry,* 71 Cal. App. (2d) 121, 161 P. (2d) 949, cited on page 9 of Appellee's brief, involved an injury of a pedestrian by an automobile. An instruction authorizing an award for future detriment was upheld because the Court found there was evidence from which the jury could find that the accident caused permanent injuries to the Plaintiff. Such a case has no application here where evidence of permanent injury or future pain is entirely lacking.

*Johnson v. Pearson,* 100 Cal. App. 503, 280 Pac. 394, cited on page 9 of Appellee's brief, involved a very serious accident in which the Plaintiff, as a result of the automobile collision, was thrown through the glass window of the automobile, sustaining many serious injuries. "The lumbar region of the spine was bruised, contused, and so sprained as to cause an impingement of the nerves in the locale spine. She also received a severe nervous shock. . . ." (285 Pac. 395.) Appellant there claimed that the instruction given regarding future damages was unsupported by the evidence. The Court said "This contention is likewise without merit. There is abundant evidence in the record from which the jury might well have concluded that Respondent's nervous condition would be permanent." (p. 396). Manifestly there was something more than tears on the witness stand before the reviewing court in affirming the judgment.

*Scally v. Garratt & Co.,* 11 Cal. App. 138, 104 Pac. 325, involved a minor boy whose arm had been badly chopped up by dangerous machinery in a foundry where he had been employed in violation of the law prohibiting such employment of minors. An instruction authorizing damages for future pain and suffering was upheld. In addition to very serious injuries to the boy's hand, arm, and muscles, including atrophy of the right arm and hand, two physicians testified that "during the remainder of his life he would in all probability continue to suffer pain from said injuries." (p. 328.) In view of such overwhelming evidence of future detriment the *Scally* case is clearly inapplicable to the case at bar. An award for future damages in the *Scally* case obviously was justified.

*Eldredge v. Clark Co.,* 75 Cal. App. 516, 243 Pac. 43, cited on page 9 of Appellee's brief; involved a fall by plaintiff into a hole made by a paving contractor. She suffered various injuries including an impacted fracture of the large bone in her right wrist. At the time of trial she still had some limitation of motion, together with pain and suffering, and "her earning power was to some extent permanently diminished." An award of $1500 was upheld. With the permanency of her injuries established it is obvious that such case has no application to the facts at bar.

*Anderson v. Freis,* 61 Cal. App. (2d) 159, 142 P. (2d) 330, cited on pages 9-10 of Appellee's brief, involved a three car collision with a complaint and a cross-complaint against the third party. No question of future detriment was involved. The Court had given intsructions on elements of damage which included damage to the automobiles and damage by reason of loss of time and expense

of medical and hospital care. Appellant claimed there was no evidence or that the evidence was lacking in figures so the jury had no basis for computing plaintiff's loss as to these items. Inasmuch as a three way collision was involved with Plaintiff receiving an award of $12,500 damages it would appear that appellant's contention in fact was not that there was no evidence of damages but rather that there were no specific figures from which the award of damage as to these items could be determined. The appellate court stated that there was no prejudicial error because the instructions were given to cover items of damage which both parties claimed in their respective actions.

*Taylor v. Pole*, 16 Cal. (2d) 688, 107 P. (2d) 614, cited on page 10 of Appellee's brief, involved the question of aggravation of a pre-existing condition. The evidence showed plaintiff (Mrs. Taylor) "was severely injuried in the accident." (p. 615.) "Some of these injuries, particularly those to the leg and foot, were expected to be permanent." "The medical experts for the defendants expressed the opinion that the condition was due to severance of the personal nerve or muscle at the point of laceration . . ." (p. 615). The judgment was reversed because the jury had been instructed that unless there was testimony from which they could determine how much of plaintiff's present condition was due to pre-existing condition and how much was due to aggravation the plaintiff had failed to prove her case and the issue should be resolved against plaintiff. The Court held such instruction too strict and the Court used the language quoted in Appellee's brief that the jury has a "wide latitude" and "elastic discretion" in determining the amount of damage. Such elasticity, however, was applied in a case where the

Court found the plaintiff was "severely injured" and some of the injuries "were expected to be permanent." (p. 615.) Hence the language is inapplicable to the case at bar where, as pointed out, there is no evidence Appellee will suffer future pain.

*Coleman v. Galvin,* 66 Cal. App. (2d) 303, 152 P. (2d) 39, cited on page 12 of Appellee's brief, to the point that injury to the nervous system may result in lasting disability involved a serious head-on automobile collision. Plaintiff sustained a concussion of the brain and "severe nervous shock." After the accident his entire personality changed. His injuries were "serious and permanent in nature." Such a case is not analogous to the present case where there is no evidence of permanent injury.

*Koyer v. McComber,* 12 Cal. (2d) 175, 82 P. (2d) 941, cited by Appellee on page 12 on the consideration to be given by an appellate court to the jury's verdict, was an action to rescind a land purchase for fraud. The facts are unrelated to the case at bar.

*Loper v. Morrison,* 23 Cal. (2d) 600, 145 P. (2d) 1, cited by Appellee on the same point, involved an automobile accident which caused plaintiff to be hospitalized for 26 days. An instruction on future damages was upheld because "at the time of trial plaintiff still was suffering from headaches, nervousness, and pain. This evidence tended to prove future damages and was sufficient to justify the instruction." Such pain, continuing till the time of trial, can be presumed to continue and hence is

evidence of future pain. In the case at bar, however, the last time plaintiff suffered pain was 6 months prior to trial. Hence the cited case is based on inapplicable facts.

In *Williams v. Layne,* 53 Cal. App. (2d) 81, 127 P. (2d) 582, cited by Appellee on page 12 on the same general point, the plaintiff at the time of trial was still incapacitated and could accept no employment. There was therefore ample evidence of damages continuing in the future. Such case is inapplicable to the case at bar where Appellee's physician discharged him as normal 6 months prior to trial and Appellee lost no work whatever.

*Stanhope v. L. A. College of Chiropratic,* 54 Cal. App. (2d) 141, 128 P. (2d) 705, cited on page 12 of Appellee's brief on the same point, was a malpractice action based on a faulty diagnosis. The plaintiff had a broken back. The faulty diagnosis was abundantly proved and the evidence was that with proper treatment the patient should have returned to work in 6 months but following this improper treatment plaintiff was still convalescing at the time of trial, 1 year 8 months after trial. Such case is obviously not analogous to the case at bar.

*Flanton v. Greenfield,* 56 Cal. App. (2d) 253, 132 P. (2d) 64, cited by Appellee on page 12, involved an automobile accident in which a pregnant woman received injuries which subsequently caused a miscarriage. That was her first pregnancy. She suffered intense pain with various injuries including subsequent curretment of the

womb and was made weak and nervous. The action of the appellate court in affirming a judgment for $2500 was on facts entirely different from those in the case at bar. No question of future pain was discussed.

*Hughes v. Duncan,* 114 Cal. App. 576, 300 Pac. 147, cited on page 13 of Appellee's brief, was an action for damages arising from an auto collision. The opinion does not disclose the extent of plaintiff's injuries or the amount of the verdict. There was no claim made that plaintiff's injuries were not substantial nor permanent. No question of future pain was involved. Objection was made that an instruction that plaintiff under certain circumstances could recover for mental pain, mental suffering, and mental anguish was unsupported by the evidence. From the fact an accident happened and injuries were sustained it is obvious that some mental anguish, mental suffering and mental pain must have been endured. The Court said it would not stop to consider whether or not the evidence supported the instruction because the jury had been instructed to award damages only for such items as were proved. Such language was applicable to the record then before the Court, namely, some evidence from which the jury as reasonable man could conclude there had been mental anguish, mental suffering, and mental pain. Such case is inapplicable to the case at bar which involves future pain and in which there was no evidence of future pain.

*Candini v. Hiatt,* 9 Cal. App. (2d) 679, 50 P. (2d) 843, the final case cited by Appellee, involved a damage

action by a young woman passenger in an automobile against the driver on account of his willful misconduct which resulted in the car overturning while rounding a curve at a high rate of speed. The uncontradicted evidence of her injuries was that her physical condition, as a result of her injuries, was extremely serious, painful and humiliating; several of her major injuries were permanent.

The Court stated the instruction authorizing an award for future medical expenses was erroneous because there was no evidence that she would incur future liability to pay any definite sum. It was clear that some medical expense would be incurred because another operation was necessary. The Court held the instruction was not reversible error because "the evidence, without substantial conflict, shows that the plaintiff was very seriously and permanently injured, and it may not be reasonably said the amount of the judgment is excessive if all question of future expense for medical care . . . is eliminated." (p. 846).

The facts of the *Candini* case are wholly unlike those of the case at bar. In the *Candini* case the injuries sustained were so severe and so permanent that the precise amount of the future medical expense became, relatively, insignificant. Such is not the fact here where, as we have shown, there is no evidence of future pain and the injuries sustained in the past, while regrettable were relatively minor.

## III.

## Appellee Has Failed in His Attempt to Distinguish the Controlling Authorities Cited in Our Opening Brief.

Appellee on page 6 of his brief attempts to distinguish the case of *Silvester v. Scanlan,* 136 Cal. App. 107, 28 P. (2d) 97 on the ground that in the *Silvester* case it "was not claimed that plaintiff suffered any substantial physical injuries." In the *Silvester* case a judgment was reversed because the Court instructed the jury they could make an award for future pain and suffering when there was no evidence such future pain and suffering was "reasonably certain." The injuries suffered by plaintiff in the *Silvester* case were described by the Court in part as follows:

> ". . . a portion of the gutter was dislodged from the roof by one of the painters and it fell to the street striking plaintiff a glancing blow . . . Plaintiff was dazed or rendered unconscious and taken to the Central Emergency Hospital . . . Plaintiff, as part of her case, introduced evidence to show that she was at times unable to do her housework or practically any work at all; that she suffered from fainting spells . . . that she could not walk any distance unassisted and could not completely dress or undress herself. There was also medical testimony to show that plaintiff was suffering from traumatic nervousness or nervousness following her slight physical injury. (28 P. (2d) 98.)

This damage to the plaintiff in the *Silvester* case is like the damage suffered by Appellee. When the physician was trying to remove the plaster of paris from Appellee's ear without an anesthetic, Appellee suffered "exquisite pain."

When plaintiff in the *Silvester* case was struck by the gutter she was rendered unconscious or dazed and taken to the emergency hospital. Appellee suffered pain and headaches for 12 or 13 days. Plaintiff in the *Silvester* case "suffered from fainting spells and had to be put to bed and on occasions remained there for 3 or 4 days at a time." (28 P. (2d) 98.) Her other injuries as described in the opinion were more serious than those of Appellee whose work sustained practically no interruption as a result of his accident and who was discharged by his physician as "normal" some three weeks after the accident [Tr. p. 88].

As pointed out in the case of *Hallinan v. Prindle,* 17 Cal. App. (2d) 656, 62 P. (2d) 1075, cited in our opening brief and not discussed by Appellee, acute but brief pain followed by some intermittent pain over a period of time is not considered a substantial injury. Consequently, on the facts, the injury to the plaintiff in the case at bar and in the *Silvester* case are considerably alike. Both plaintiffs went to the hospital. The incapacity suffered by the plaintiff in the *Silvester* case, involving fainting spells requiring her to remain in bed for several days, is certainly as severe as the headaches and pain in the ear suffered by Appellee for 12 days following the accident. The nervousness suffered by plaintiff in the *Silvester* case is as serious as the subjective sensation of a fly bothering Appellee's ear which he testified had ceased 5 or 6 weeks before trial and which he had never even mentioned to his physician. It is precisely to factual situations like the case at bar and the *Silvester* case where the unwarranted injection of an

award for possible future detriment is liable to puff up the verdict and hence is reversible error. The *Silvester* case is squarely in point on the facts and the law. The final words are particularly apt:

> "By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical injury and subsequent alleged suffering, and what portion represented prospective damages for mental ailments that might or might not be suffered in the future. For the reasons given, the judgment is reversed." (28 P. (2d) 99.)

*Bellman v. San Francisco High School District*, 11 Cal. (2d) 576, 81 P. (2d) 894, cited in our opening brief, is likewise squarely in point. That case quoted the *Silvester* case with approval. It is true, as both we and Appellee pointed out, that the Court there did not discuss the instructions given. But it is true, which Appellee ignores, that in the *Bellman* case the Supreme Court reduced a judgment by ⅔ because "the medical testimony fails to show any certainty of serious permanent injury." The award was reduced to compensate solely for the injuries plaintiff had suffered in the past.

The holding of such cases must be the law if effect is to be given to the provision of the Civil Code limiting damages to detriment suffered or "certain to result in the future." (Civ. Code, 3283.)

In exceptional cases, of course, where very severe damages were sustained and the element of future damages obviously played an insignificant part, the Courts can properly disregard an erroneous instruction on future damages. But in cases like the case at bar, where by comparing

the amount of the verdict with the extent of the past injuries, it is obvious that the erroneous submission of the question of future pain probably affected the size of the verdict, the judgment must be reversed or reduced. To fail to take such action would result in judicial nullification of the standard laid down by the Civil Code for the award of damages for future pain.

> "Even though an instruction is couched in proper language it is improper if it finds no support in the evidence, and the giving of it constitutes prejudicial error of it is calculated to mislead the jury."
>
> *Davenport v. Stratton,* 24 Cal. (2d) 232, 149 P. (2d) 4, 15.

## Conclusion.

Although it is regrettable that Appellee suffered any pain at all, the evidence shows his pain was of relatively brief duration and he has fortunately suffered no permanent injuries. The trial court in acceding to Appellee's request and, over our objection, instructing the jury they could award damages for future pain, evidence to support such an award being absent, obviously misled the jury and prevented Appellee from having the judgment against it based on the actual detriment Appellee has suffered.

For the reasons set forth herein and in our opening brief the judgment should be reduced or reversed.

Respectfully submitted,

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